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IN THE

SUPREME COURT OF THE UNITED STATES.

1964

LESTER G. McKINNIE, NATHAL WINTERS, JOHN R. LEWIS, HARRISON DEAN, FREDERICK LEONARD, ALLEN CASON, JR., JOHN JACKSON, JR., and FREDERICK HARGRAVES,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

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MAY IT PLEASE THE COURT:

The petitioners, Lester G. McKinnie, Nathal Winters, John R. Lewis, Harrison Dean, Frederick Leonard, Allen Cason, Jr., John Jackson, Jr., and Frederick Hargraves, were convicted by a jury in Davidson County, Tennessee, for a conspiracy to injure the business of the B & W Cafeteria by blocking the entrance to the restaurant in violation of Section 39-1101, Tennessee Code Annotated,

and Section 62-711, Tennessee Code Annotated. Punishment for each petitioner was fixed in a manner according to the law of Tennessee at ninety days in the Workhouse of Davidson County and a fine of $50.00.

To show the motive of the petitioners, it was set out in the indictment that the management of the B & W Cafeteria of Nashville, Tennessee, was operating a restaurant open only to people of the white race pursuant to Section 62-710, Tennessee Code Annotated, which abrogates the common law to the extent that keepers of hotels, public houses, etc., may exclude any person whom they shall for any reason choose.

OPINION BELOW.

The opinion of the Supreme Court of Tennessee the petitioners seek to have reviewed is not yet officially published nor unofficially published in the South Western Reporter series but it has been made an appendix to the petition for writ of certiorari in this cause.

STATEMENT OF THE EVIDENCE.

The petitioners appeared at the entrance of the B & W Cafeteria, Sixth Avenue, Nashville, Tennessee, about 12:00 p. m., Sunday, October 21, 1962 (Tr. 765-766) (the letters "Tr." as used in this Statement of the Evidence is an abbreviation for transcript of the record), at a time when the entrance was crowded because of people arriving for lunch after being dismissed from church (Tr. 1068). After being informed by Otis Williams, who was employed by the cafeteria as a doorman that the cafeteria did not serve colored people and that they could not enter, the petitioners insisted, "We are coming in and going to eat when we git in" (Tr. 1070-1071).

Petitioners were asked to move along and not to make any trouble for the restaurant, but they remained in the vestibule area, approximately 4′ x 4′. (The doorman testified that the vestibule was 6′ x 6′ 4″. (Tr. 1070).) Only a few people managed to squeeze through the vestibule (Tr. 768-770). The City Policemen were called and they escorted the petitioners away from the entrance (Tr. 771-772), after they refused to leave otherwise (Tr. 1035).

One of the State's witnesses described the situation as follows:

> "Well, it was still blocked and people inside couldn't get out. And you could see the crowd outside—wasn't coming in. And it just seemed like an awfully long time till the—under the circumstances—it wasn't too long—while that state of confusion existed. And the police came and then they—it was a question of what to do then. I was talking to some of the policemen, and I was a lawyer, and they thought I knew everything and could solve the situation, and I must admit that I didn't know what to do myself."

This same witness testified that after the vestibule of the restaurant was cleared, the crowd inside the restaurant went out and the crowd outside the restaurant entered (Tr. 939).

BRIEF AND ARGUMENT.

Counsel for the petitioners insist six questions are presented in their petition for writ of certiorari to this Honorable Court for determination. The first three of these are to the effect that the petitioners' conviction of an unlawful conspiracy to injure trade and commerce by peaceably protesting their denial to enter and be served by a cafeteria open only to white persons constituted a denial of their right to due process and equal protection as guaranteed by the Fourteenth Amendment, Constitution of the United States.

Counsel for the Respondent, State of Tennessee, does not agree that the protesting of the petitioners was peaceful but on the contrary insists that it was not done in a peaceful manner. The jury who determined the facts in the trial court found that the conduct of the petitioners on this occasion was not peaceful. The trial judge did not find it to be peaceful and the Supreme Court of Tennessee did not find it to constitute peaceful protesting; and this Honorable Court in the case of **Feiner v. People of State of New York,** 340 U. S. 315, 71 S. Ct. 303, 95 L. Ed. 295, did not find very similar conduct to be peaceful as indicated by the following excerpt, 340 U. S. 320, 71 S. Ct. 306, 95 L. Ed. 300:

> "The language of Cantwell v. State of Connecticut, 1940, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, is appropriate here. 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to

another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.' 310 U. S. at page 308, 60 S. Ct. at page 905. The findings of the New York courts as to the condition of the crowd and the refusal of petitioner to obey the police requests, supported as they are by the record of this case, are persuasive that the conviction of petitioner for violation of public peace, order and authority does not exceed the bounds of proper state police action. This Court respects, as it must, the interest of the community in maintaining peace and order on its streets. Schneider v. State of New Jersey, Town of Irvington, 1939, 308 U. S. 147, 160, 60 S. Ct. 146, 150, 84 L. Ed. 155; Kovacs v. Cooper, 1949, 336 U. S. 77, 82, 69 S. Ct. 448, 451, 93 L. Ed. 513. We cannot say that the preservation of that interest here encroaches on the constitutional rights of this petitioner."

Peaceful protesting in this case is very analogous to peaceful picketing. Peaceful picketing has been defined in **Goldfinger v. Feintuch**, 11 N. E. 2d 910, annotated 116 A. L. R. 477; and **Senn v. Tile Layers Union**, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229. In those cases it was held that any form of physical obstruction or interference with business was beyond the realm of peaceful picketing.

The next question presented according to counsel for the petitioners is to the effect that the convictions were based upon a matter not litigated in the trial court. It was insisted at the trial, in briefs before the State Supreme Court, and now in the petition filed with this Honorable Court that the petitioners were denied due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment, Constitution of the United

States, because no determination was made relative to the constitutionality of Section 62-710, Tennessee Code Annotated, which authorizes owners of hotels, etc., to deny entry thereto to any person they desire for any reason whatsoever. Counsel for the State of Tennessee's reply to this insistence is that the petitioners were being tried for their own conduct without regard to the conduct of the B & W Cafeteria management. If their conduct (cafeteria management) was such as to deny petitioners' constitutional rights, the state courts and federal courts are available to the petitioners for a protection of their rights. The petitioners on this occasion were not pursuing such a legal remedy nor any other legal remedy, but, on the contrary, they sought redress of their grievances in an unlawful and unpeaceful manner. Recently, this Honorable Court in the case of **Garner v. State of Louisiana**, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207, held that it could be determined whether or not the conduct of the defendants in that case was lawful or unlawful without deciding whether or not the owners of private property have a right to serve only those whom they choose and refuse to serve others whom they desire not to serve for whatever reason they think sufficient.

The trial judge instructed the jury that the petitioners were guilty of an unlawful conspiracy to injure trade, etc., in violation of Sections 39-1101, 62-710, and 62-711, Tennessee Code Annotated. That portion of his charge regarding Section 62-710, Tennessee Code Annotated, was erroneous. This section of the Code is not a criminal section and, as stated above, was only included in the indictment to show the motive of the petitioners for violation of the other two sections of the Code and, of course, there was no evidence to show that the petitioners were in violation of this civil statute. The instruction was in the nature of a typographical error. However, counsel for the petitioners insist that the inclusion of this statute in

the trial judge's instruction in the manner stated above had the effect of depriving them of the right to due process and equal protection of the law. But, on the other hand, it apparently did not so appear to counsel for the petitioners during the trial of the case since no requested instruction to correct the matter was made, and when the whole charge is considered together, it is submitted that this error, typographical in nature, could not have had the effect of confusing or misleading the jury. See Vol. 23-A, C. J. S. 1320, Inadvertent Errors and Omissions, page 786.

Finally, it is insisted in the sixth question presented by counsel for the petitioners that they were denied due process and equal protection as guaranteed by the Fourteenth Amendment, Constitution of the United States, by being put to trial before white jurors who "admitted personal practice, custom, philosophy and belief in racial segregation." There is no insistence that members of the colored race were systematically excluded from the jury and the record reveals that a number of Negroes were called for jury service but were all excused for one reason or another. (See Appendix Page 11-A to the Petition.) Even though some of the jurors stated on voir dire that they believed in the right of the owner to segregate his restaurant, they all stated that they would set aside their own opinion and decide the case on the evidence and the law, the test universally applied for determining competency of jurors otherwise qualified. The Supreme Court of Tennessee in the case of **Kennedy v. State**, 186 Tenn. 310, has held on this question that members of the Negro race have no constitutional right to a trial by a mixed racial jury but do have a right that members of their race shall not be discriminated against in the selection of juries. (The rule was only applied to the selection of grand juries in the Kennedy case.) This is not inconsistent with the rule announced in other jurisdictions on

this question, including this Honorable Court. **Bush v. Commonwealth of Kentucky**, 107 U. S. 110, 1 S. Ct. 625, 27 L. Ed. 354, and **Hoyt v. Florida**, 368 U. S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118. See also 116 A. L. R. 1412.

In a discussion of one of the reasons for the granting of the writ, it is insisted that the question presented in this case is "identical with or similar to, issues now pending before this court in other cases where certiorari has been granted . . .". Counsel for the State of Tennessee would point out that there is a wide gulf between the phrases "identical with" and "similar to" and submits that in the cases relied upon by counsel for the petitioners, the protesting was peaceful, but in this case the protest made by the petitioners was not peaceful. Counsel for the State of Tennessee contends that the basic issue in this case is whether or not the protest of the petitioners was peaceful and counsel for the State concedes that if the protests made by the petitioners were peaceful, the petitioners are entitled to the relief they seek and to have their conviction for a conspiracy to unlawfully injure trade and commerce reversed, but, on the other hand if, as is insisted upon by counsel for the State, the petitioners "took the law in their own hands," the conviction should be sustained.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

.....

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

I certify that I forwarded a copy of this Reply to Petition for Writ of Certiorari to Mr. Avon N. Williams and Mr. Z. Alexander Looby, Attorneys at Law, Charlotte at Fourth, Nashville, Tennessee, on this the 9 day of June, 1964.

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Thomas E. Fox,
Assistant Attorney General,
State of Tennessee.